15-9-77. 200/77

G.P.-S.25617—1974-75—3 000 J 219

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

{ T/PRETORIA Provincial Division)
Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

STANFORD'S MINING MATERIAL + HARDWARE (PTY) LTD *Appellant,*

versus

H. L + H BUILDING SUPPLIES *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* ISRAEL + J.

Respondent's Attorney / *Prokureur vir Respondent* Lebos + Newgate.

Appellant's Advocate / *Advokaat vir Appellant* C.G. Mendelow

Respondent's Advocate / *Advokaat vir Respondent* R.M. Wise

Set down for hearing on
Op die rol geplaas vir verhoor op

(TPD)

Coram: Wessels CJ, Hofmeyr, Notze JJA et Trengove AJA

Vir Appellant: C.G. Mendelow
9h45 - 11h00 ; 11h15 - 11h20.

Vir Respondent: R.M. Wise. Not called upon.

The Court dismisses the appeal with costs.

Judgment per:

Bills taxed—Kosterekenings getakseer

Date Datum	Amount Bedrag	Initials Paraaf

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

STANFORD'S MINING MATERIAL AND HARDWARE (PROPRIETARY) LIMITED — APPELLANT

AND

H.L. & H. BUILDING SUPPLIES (PROPRIETARY) LIMITED — RESPONDENT

Coram: Wessels, Corbett, Hofmeyr, Kotzé, JJA., et Viljoen, AJA.

Heard: 8 September 1978

Delivered: 9 November 1978

J U D G M E N T

HOFMEYR, JA:

It is common cause between the parties that the appellant delivered certain building material at the respondent's premises on 3 January 1974. It was also agreed

that ...../2

that the respondent duly took delivery of the material. The appellant claimed a sum of R6 256-62 with interest and costs, this sum representing the alleged purchase price of the goods.

The appellant was on 31 July 1973 provisionally liquidated and a final order of liquidation was granted on 5 February 1974. The abovementioned delivery was therefore made while the appellant was under provisional liquidation. A former director of the appellant, one S. Katz, had been appointed by the provisional liquidator (one Druker) to carry on the normal business of the appellant. Katz had to restrict credit sales to persons whose credit was good and he had to consult with Druker on all important matters.

It was alleged by the appellant that Katz, on behalf of the appellant while under provisional liquidation, entered into an oral agreement with the respondent, set out in the appellant's amended declaration as follows:-

"(a) ...../3

"(a) It (the appellant) agreed to sell and deliver to the Defendant (the respondent) certain goods for various agreed prices.

(b) That payment for the said goods would be made by way of the Defendant setting off any amount which the Plaintiff Company then owed to it against the amount which would become owing by the Defendant to the Plaintiff Company for such goods.

(c) That the aforesaid Agreement as set out in (b) above was subject to the agreement and consent of the Provisional Liquidator of the Plaintiff Company and in the event of the said Provisional Liquidator not agreeing to the terms of payment as aforesaid, payment would be made by the Defendant to the Plaintiff within a period of 30 days after date of delivery of the aforesaid goods, alternatively after the lapse of a reasonable time after delivery".

It was further alleged by the appellant that Druker, who was subsequently appointed liquidator, on a date not specified in its declaration, agreed to the sale but not to the payment being made by way of set-off. In its further particulars appellant admitted that it was at the

time ...../4

time indebted to the respondent in an amount of R8 874. It also stated that Druker orally refused to agree to payment being made by way of set-off in or about February 1974 at Johannesburg at his offices.

The respondent's plea consisted substantially of a denial of the appellant's case. At the pre-trial conference held in terms of Rule 37 significant admissions were, however, made by respondent in paragraph 7 of the minute which reads as follows:-

> "On or about the 3rd January 1974, Defendant took delivery from the Plaintiff of all the goods reflected in Annexure 'A' of the Plaintiff's Further Particulars, being Pages 16 to 21 inclusive of the Pleadings which delivery was given and received in pursuance of an Agreement between the Parties. The precise terms and effect of this Agreement are in issue and are to be determined by this Honourable Court".

Further admissions appearing in the minute are that the written offer of compromise made in respect of the appellant, furnished by the appellant as part of the plea-

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dings, is a true and correct copy of the document; that the offer was made on 30 May 1974; that the appellant was finally discharged from liquidation on 19 November 1974; and that the respondent did not lodge or prove any claim against the appellant at any stage.

After the refusal of an application for absolution from the instance, counsel for the appellant was granted an amendment of the allegation regarding the date on which Druker refused his consent to payment by way of set-off. The amendment was to insert the words: "alternatively in and during August 1974".

The Judge a quo accepted the evidence of Kruger and Edwards, representatives of the respondent, which he paraphrased as follows:-

> "There was no question of a sale in the ordinary sense, namely that the defendant would pay for the goods with money or otherwise than by setting off the value of the goods taken against the debt owed by the plaintiff to the defendant. They also said that Katz

informed ...../6

> informed them that he had full authority to make the deal. There was no mention, they said, of any consent or confirmation by the liquidator being required".

Katz testified, inter alia, that he could not agree to a set-off unless Druker consented and that he told respondent's representatives (probably the witnesses Kruger and Edwards) of this position and further that if Druker did not agree, the sale would be on the appellant's usual terms, viz. payment within 30 days. Katz contradicted himself seriously by declaring in the first place that he referred the matter of set-off to Druker before delivery of the goods and later that he only referred the matter to Druker after delivery. It is unlikely that he informed Druker of the suggested payment by means of set-off before delivery.

The circumstances in which it was agreed that the building materials would be delivered, seem to indicate that the parties did not contemplate an ordinary sale if payment by way of set-off failed. The respondent had not

previously ..../7

previously bought such goods on a large scale from the appellant. Some of the items the respondent normally obtained from its usual suppliers. Other items were taken over in small quantities whereas such items were normally purchased by the truck-full. The alleged intention of the respondent was to take over materials of sufficient value to discharge the whole or part of the very substantial indebtedness of the appellant to the respondent. Added to the circumstances militating against a purchase in the normal course of business, is the admitted fact that Katz had undertaken a personal suretyship for the debts of the appellant. There was in consequence of this a possibility that the set-off transaction might also have aimed at relieving Katz to some extent from his personal liability on behalf of the appellant as suggested by the witness Kruger.

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It is not necessary to embark upon any further analysis of the evidence. The Judge a quo formed a better impression of Kruger and Edwards as witnesses than of Katz. The latter, as has been shown earlier in this judgment, gave self-contradictory and unsatisfactory evidence. These three were the main witnesses to testify for the parties. The result of the judge's analysis of the witnesses and their evidence is that he could not find that the appellant had discharged the onus of proving the contract alleged by it, i.e. that there was a sale, the terms of which were that, if the liquidator refused to consent to a set-off, payment would be made within 30 days of delivery. This finding in my opinion was justified on the evidence and on the probabilities of the case. The appeal before this Court was argued on the basis that this finding of the Judge a quo could not be challenged. Counsel for the appellant in the course of his address even conceded

that ...../9

that the parties had not come to an express agreement on the terms alleged by the appellant.

It appears that it was submitted in the Court a quo that a contract of sale on the terms alleged by the appellant had nevertheless come into existence as a result of the subsequent conduct of the parties. The Judge a quo dismissed this submission stating that it had in any event not been pleaded.

Before this Court counsel for the appellant sought to make the same point. He urged upon us that on a proper analysis of the surrounding circumstances and the conduct of the parties, particularly the conduct of the respondent after the delivery to it of the goods in retaining possession, there came into existence between the parties a tacit agreement of purchase and sale in terms of which the respondent agreed to purchase the goods in question at the alleged prices. Even if the contract was not capable of direct classification into the category of purchase and

sale, so the argument ran, it could nevertheless be construed as an innominate contract to which the court could give effect. Counsel also submitted that the respondent thus approbated a contract on terms other than those intended by it, and thereby became bound to make payment of the agreed price or value. It was finally contended that the foregoing submissions did not fall beyond the ambit of the pleadings; no prejudice could, in any event, befall the respondent inasmuch as all the material facts were canvassed at the trial by both parties.

The submissions on behalf of the respondent were that a court of appeal will not decide a matter on a basis not pleaded unless it is satisfied that the issues were substantially broadened in the Court a quo and that this other basis emerged as the issue during the course of the trial. The new issue should have been fully investigated and all evidence placed before the trial

court ...../11

court. Reliance for these propositions was placed on - Shill v. Milner, 1937 AD 101 at pp 105 and 106; Van Mentz v. Provident Assurance Corporation of Africa Ltd, 1961(1) SA 115 (A) at 122 and Geoghegan v. Pestana, 1977(4) SA 31 (T) at 37. In the present case the issue as to whether there was a tacit agreement between the parties, did not emerge as an issue during the hearing of the trial. It cannot, therefore, be said with any assurance that the material facts involved were canvassed by both parties at the trial or that all relevant evidence was placed before the trial court. Even the facts upon which the appellant sought to rely were directed to prove the appellant's case as pleaded. Although several amendments were applied for even as late as after the close of its case, this new issue was not included in the pleadings. This, it is submitted, also suggests that there was no intention at the trial to raise the question of a tacit agreement as an issue to be tried.

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The record of the proceedings at the trial bears out the submissions made on behalf of the respondent. It is indeed clear to me that the issue of whether or not a tacit agreement based on the conduct of the parties ever came into existence, was never raised as an issue during the trial. The matter could therefore not have been properly canvassed during the trial. The respondent is also borne out by the decisions cited by him. I must add a further authority where the principles concerned are set out in a clear and instructive manner. In South British Insurance Co. Ltd. v. Unicorn Shipping Lines (Pty) Ltd., 1976(1) SA 708 (A) at p 714 G HOLMES, JA., is reported as follows:-

> "However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue".

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It does appear from the record as stated earlier in this judgment that the Judge a quo dealt with the appellant's contention at the trial. He disposed of the submission in two sentences which I now quote verbatim:-

> "It cannot be said that a contract of sale on the terms alleged by the plaintiff came into existence as a result of the subsequent conduct of the parties. In any event that was not pleaded".

In so far as this is a ruling on the merits of the case, it goes directly against the appellant, and cannot be successfully challenged on appeal. There is in any event no doubt in my mind that the evidence on record is insufficient to support the appellant's contentions. There was, however, no need for the Judge a quo to consider the merits of the new suggestion raised by the appellant. It is clear that the matter could not have been fully argued before him. If the special circumstances in which a matter can be raised without being pleaded, had been

dealt ...../14

dealt with fully at the trial, it is most unlikely that the submission would have been disposed of by such a laconic and blunt ruling, viz. "and in any event that was not pleaded".

I should refer in passing to the submission that the appellant's contentions in support of the existence of a tacit agreement did not fall beyond the ambit of the pleadings. This is a most ambiguous statement. Even if it is intended to convey that the issue was inferentially pleaded there is no substance in such a contention.

For these reasons the order of absolution from the instance with costs granted by MC EWAN, J., must be upheld.

The appeal is dismissed with costs.

HOFMEYR, JA

Wessels, JA)
Corbett, JA)
Kotzé, JA) Concur
Viljoen, AJA)